

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:09-CR-157-BO
NO. 5:11-CV-596-BO

COVEN EARL GABRIEL-VICK,)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
Respondent.)

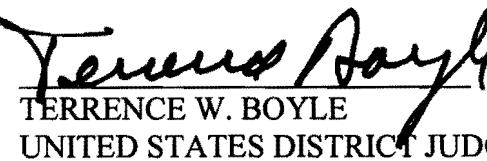
This matter is before the Court on Petitioner's Corrected Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE 54]. Petitioner, Mr. Gabriel-Vick, asserts that he is not guilty of having been a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) in light of the Fourth Circuit's holding in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc).

The government moved to dismiss Mr. Gabriel-Vick's § 2255 petition, arguing that his claim was barred by the one-year statute of limitations governing such motions. 28 U.S.C. § 2255(f). The government has recently withdrawn its motion, stating that it waives its reliance on the statute-of-limitations defense [DE 68]. Furthermore, in addition to raising for the first time that the instant § 2255 petition is second or successive, 28 U.S.C. § 2255(h), the government now concedes that Mr. Gabriel-Vick "has a meritorious claim of actual innocence." Accordingly, the government urges the Court to treat Mr. Gabriel-Vick's *pro se* Motion to Vacate as a petition pursuant to 28 U.S.C. § 2241 as § 2255 is arguably an inadequate or ineffective means by which to test the legality of his petition. See *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); see also

United States v. Pararas-Carayannis, 238 F.3d 432, 2000 WL 1350583 (9th Cir. 2000) (district court has authority to treat § 2255 petition as one brought under § 2241).

In light of the foregoing and the hearing held in this matter on August 29, 2012, the Court accepts the government's withdrawal and request to treat the pending § 2255 petition as a petition pursuant to § 2241.¹ Mr. Gabriel-Vick's petition pursuant to 28 U.S.C. § 2241 is GRANTED and the judgment and conviction entered in this matter on July 14, 2010, is hereby VACATED. Mr. Gabriel-Vick is ORDERED to be released from federal custody forthwith.

SO ORDERED, this 29 day of August, 2012.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

¹The Court notes that the government has contended that Mr. Gabriel-Vick is currently housed at FCI-Butner and that jurisdiction under § 2241 therefore lies in this Court.